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Nature of Rules and the Meaning of Meaning

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THE NATURE OF RULES AND THE MEANING OF MEANING

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I. INTRODUCTION

This essay addresses two problems in legal theory. What is the nature of rules, especially legal rules? What is the meaning of a legal rule?

My main concern is the relation between these two questions. I inquire whether a sensible view of how rules work commits one to any particular approach to meaning. For this inquiry, I focus on Frederick Schauer's illuminating treatment of rules in *Playing by the Rules*,[1] which he says is linked to a particular view of meaning. I assert that the linkage is much less tight than he supposes, and that competing theories about meaning are compatible with his analysis. If I am right, someone's disagreement with Schauer over meaning should not produce rejection of his major points. However, approaches to meaning do have considerable practical significance for the law. Examining how views of meaning fit legal practice, I reject Schauer's strong literalism.

I begin by introducing some broad problems about "meaning" that affect law. I next sketch Schauer's fundamental claims about rules. I then summarize what he says about meaning and how that relates to an understanding of rules. At this stage, the critical analysis commences. I ask how far different theories about meaning can accommodate his observations about rules, and show that they can do so to a great extent. The exploratory remainder of the paper focuses on meaning in law. Representing much less than a full blown theory, it nevertheless clarifies much of what is at stake and counters common confusions.

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1 FREDERICK SCHAUER, PLAYING BY THE RULES (1991).

II. SOME COMMON SENSE ABOUT MEANING

In everyday life, people talk without difficulty about what someone or something means. Yet, when we pause to ask seriously what is involved when we assign a meaning to something, puzzling questions confront us. One potential source of difficulty involves what we might call levels of meaning. Consider the following remark by P (a parent) to TC (a teenage child). "Don't go out at night. Being out at night means trouble." We might say the following things about P's remarks: (1) P *means* TC should stay in from early evening until shortly before sunrise. This follows from the *ordinary meaning* of "Don't go out" and "at night." (2) P *means* to prevent TC from having easy access to drugs. Here "means" concerns P's *intention* or *purpose.* (3) The health and safety of TC "mean" a lot to P; that is, P values or attaches great *significance* to TC's health and safety. (4) When P says being out at night *means* trouble, P asserts a "natural" correlation of the two, similar to the thought that clouds *mean* rain.[2] These are very different senses of meaning, and one must be on guard not to conflate them. But even if one restricts oneself to ordinary meaning (in some sense), perplexities remain.

Some perplexities are dissipated when we reflect on how we construct sentences about meaning. Other perplexities persist, but they are less daunting when we see that questions about meaning arise in regard to many different sorts of communications. I shall concentrate on standard instances of words someone (or some group) speaks or writes, whose significance is discerned by others. Among such instances are statutes that citizens follow and officials apply, and letters from one friend to another. In this section, I use an imagined letter to illustrate a number of statements one might make about meaning.

In 1910, Mary wrote to her friend Elizabeth, "My daughter's fiance, John, is sentimental. I think he will make a good husband." Sanford Levinson has noted that the *Oxford English Dictionary* defines "sentimental" as the following: "Of persons, their dispositions and actions; characterized by sentiment. Originally in favorable sense: Characterized by or exhibiting refined and elevated feeling. In later use: addicted to indulgence in superficial emotion; apt to be swayed by sentiment."[3] Levinson remarks, "What had been a term of praise be-

2 *See Law and Linguistics Conference Proceedings*, 73 WASH. U. L.Q. 785, 825 (1995) [hereinafter *Proceedings*] (Comment of Michael L. Geis); Michael L. Geis, *The Meaning of Meaning in the Law*, 73 WASH. U. L.Q. 1125, 1125–26 (1995).

3 2 OXFORD ENGLISH DICTIONARY 2730 (compact ed. 1971), *quoted in* Sanford Levinson, *Law as Literature*, 60 TEX. L. REV. 373, 376 (1982).

came one of mild reproach."[4] If the meaning of sentimental was in flux in 1910, what does "sentimental" mean in Mary's letter? Among the possibilities, three stand out: (1) "Sentimental" is to be taken in its old sense, in which event this positive quality bears obviously on whether John would be a good husband. (2) "Sentimental" is to be taken in the modern sense, in which event either that particular quality is unrelated to why Mary thought John would be a good husband or Mary supposed that that quality is desirable in husbands (perhaps because she thought sentimental men are less harsh and domineering). (3) "Sentimental" is to be taken as including some mix of the qualities of the old and new senses. We can ask a number of questions about the meaning of "sentimental" in the letter.

One question is what Mary meant by the word. That depends on what she intended to convey. We may not easily reconstruct Mary's state of mind, but (unless we delve into unconscious meanings) we face no conceptual difficulty trying to answer this question. A second question is what Elizabeth, the letter's recipient, thought "sentimental" meant. This is a question about how Elizabeth understood "sentimental" in the letter, not a question about her own use of the word. We could ask the same question for any subsequent readers of the letter, and if their responses were easily classifiable[5] we might say what most people who have read the letter thought "sentimental" meant.

If we were interested in how other people *would* respond, we might ask, "How would most people in 1910 have understood 'sentimental' in such a letter?" and "How would most people now understand it?" These hypothetical questions raise complications actual readers do not present. We need to clarify what class of people count—presumably competent speakers of English, perhaps with some minimal level of vocabulary or education. More troubling, we should specify what information about the circumstances of the letter our hypothetical readers will have. Will modern readers know the letter was written in 1910 rather than last month? (Some of them may be aware that the dominant sense of "sentimental" has shifted.) What will readers know about Mary? Actual readers have brought to bear their knowledge of Mary's life, however great or slight. Will our hypothetical readers take the letter as an isolated fragment, or with some information about Mary? Some questions about hypothetical readers

4 Levinson, *supra* note 3.

5 In reality, the meaning the word would have for most people would be much more complex than an either-or choice between two competing meanings. Felix Cohen once suggested that a sentence may not mean exactly the same thing to any two different people. Felix Cohen, *Field Theory and Judicial Logic*, 59 YALE L.J. 238, 240–41 (1950).

may prove impossible in fact to answer; but the questions do not pose any deep conceptual puzzle.[6]

At the end of the day, we might conclude that Mary meant "sentimental" in the new sense, as most modern readers would so understand it, but that Elizabeth and most actual readers took "sentimental" in the old sense, as would most 1910 readers.[7] We could generalize that the ordinary sense of what particular words mean shifts over time (Levinson's basic point), and that the context in which a word is placed influences how it is understood. This happens most strikingly when a single word, like "duck," has distinct meanings, but it also happens when words have various shadings. In Mary's letter, the connection of the word with the opinion that John will make a good husband points (though not conclusively) toward the older sense of "sentimental."

We reach deeper conceptual waters if we ask a question different from any of those yet posed: "What does 'sentimental' mean in Mary's letter?" This question is not *explicitly* about what Mary tried to convey or about the response of actual or hypothetical readers. Perhaps an ordinary letter means what the writer intended, but what of a novel or poetry? Most modern schools of criticism agree that their meaning is not determined by the author's intentions. Any general theory about meaning must cover a variety of linguistic (and other) forms of communication.

One way a theory might deal with this variety is to posit a unity about meaning, one approach to what linguistic formulations mean that holds for all of them. A second possibility is to perceive meaning as related to domains of discourse; in that event, the standard(s) for the meaning of a passage from a letter may differ from the standard(s) for the meaning of a couplet. An author's intention may count for more in letters than poetry, because the purposes of ordinary letters and poetry differ. Yet another possibility is that the idea of a single approach to meaning, for one domain or for many, is itself misconceived.[8] Perhaps we should be satisfied to ask what a communication means to the writer, to members of the audience, to us, to hypothetical readers variously defined, without talking about what the communication means per se, or by itself.

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6 Any effort to pose some ideal hypothetical reader is more complicated. For the view that this construct does not fit with a prototype approach to meaning, see Marc R. Poirier, *On Whose Authority?: Linguists' Claim of Expertise to Interpret Statutes*, 73 WASH. U. L.Q. 1025, 1038–39 (1995).

7 *See supra* note 5.

8 *See* WILLARD VAN ORMAN QUINE, WORD AND OBJECT (1960).

These preliminary observations set the stage for analysis of how Professor Schauer relates his understanding of rules to his account of meaning.

III. SCHAUER ON MANDATORY RULES

One of the virtues of Schauer's superb book is that the analysis develops by stages; he establishes simple points before tackling more complex ones. My summary, by contrast, links together thoughts about the same subject from different parts of the book.

Schauer conceives rules, descriptive and prescriptive, as generalizations. Prescriptive rules link factual predicates with prescribed consequences.[9] To use his example, "No dogs allowed in this restaurant," is a prescriptive rule. Prescriptive rules typically are overinclusive and underinclusive, and future events may make them so if they are not originally.[10] Suppose the rule against dogs in the restaurant is to prevent disturbances: some dogs, for example, seeing-eye dogs, do not threaten disturbance and some other animals, not covered by the rule, do threaten disturbance.

A true (mandatory) rule, in Schauer's sense, exerts pressure for conformity even when the action it calls for is not covered by the background justifications that lie behind the rule (or strong countervailing reasons would override the justifications). Thus, the rule against dogs in the restaurant will apply even as to dogs who pose no threat of disturbance.[11]

Schauer contrasts mandatory rules with the instructions one finds in recipes, etc., and with other rules of thumb;[12] these give way if their background justifications do not apply, or if strong countervailing reasons do apply.[13] Against the suggestion that rules of thumb don't re-

9 SCHAUER, *supra* note 1, at 23.

10 *Id.* at 32–35. Schauer also speaks of a third type of bad fit, that facts suppressed by the generalization may turn out to be germane, *id.* at 38, but he suggests that this type of bad fit is "parasitic on the first two," *id.* at 47 n.10, and I am inclined to think it collapses into them.

11 Perhaps the more typical situation of bad fit is when the background justifications have some slight relevance, but not nearly enough to warrant the consequences the rule calls for. Thus, perhaps any dog poses a *slight* danger of disturbance (even the best behaved dog may choke or fall ill), but the rule would never have been adopted were all dogs very well behaved. In my discussion, whenever I talk of an absence of fit between justifications and rule, I mean to include such instances; and I believe that is faithful to Schauer's own understanding, though he usually talks about a complete lack of correlation.

12 For Schauer, recipe-like instructions apparently are one variety of rule of thumb, though he does not state that explicitly.

13 *See* SCHAUER, *supra* note 1, at 3–4, 104–10.

ally make a difference and are "normatively impotent,"[14] because one might as well refer directly to background justifications, Schauer points out that people may follow rules of thumb when they cannot do their own calculations and even when they believe weakly, but are not convinced, that following the rule will not produce the desired result. Thus, rules of thumb often increase *burdens* of justification, but they are nonetheless vulnerable to outside justifications in a way that mandatory rules are not.[15]

Schauer's primary interest is mandatory rules. These rules are entrenched generalizations.[16] They need not be absolute; they may be *overridden* when their background justifications have no bite or when countervailing reasons are very strong. Depending on their settings, mandatory rules can have varying degrees of strength.[17] But it is critical that they exert *some pressure* for conformity, beyond their background justifications.[18]

Schauer emphasizes the following scenario: the agent understands that a rule requires a certain kind of action, but he does not think the background justifications cover the situation.[19] The agent treats the rule as a mandatory rule if he believes that he still has a reason to follow the rule.[20] This scenario helps give definition to Schauer's idea of mandatory rules, but another scenario envisioned by Schauer may be more common. The agent, recognizing that he is subject to a mandatory rule, does not pause to figure out whether the background justifications apply.[21]

Schauer discusses certainty, reliability, predictability, and efficiency as reasons for rule-based decisions.[22] Once we recognize the good reasons to follow rules, we perceive "rule-generated" justifications, as well as substantive justifications, for behaving as a rule indicates.[23]

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14 *Id.* at 105.

15 *Id.* at 109.

16 *Id.* at 15, 52.

17 *Id.* at 8–10, 113–18.

18 Schauer notes that a set of justifications laying behind a formulated rule may itself operate as entrenched vis-a-vis the deeper justifications that lie behind them and vis-a-vis competing justifications. *Id.* at 74–75, 212–13. This point is very important for understanding law, but is not critical for the particular problems I discuss.

19 *See supra* note 11, for an extension of this scenario.

20 *See, e.g.*, SCHAUER, *supra* note 1, at 113.

21 Or the agent "glimpses" briefly to see that there are not overwhelming reasons for noncompliance. *See id.* at 230.

22 *Id.* at 137–53.

23 *Id.* at 94. The force of rule-generated justifications will look slightly different if one is thinking of creating a rule rather than following a rule.

Rule-generated justifications present us with a slightly more complex picture of the relation between a formulated rule and its justifications. On some occasions, the substantive justifications behind a rule (peace in the restaurant) may not apply, but the rule-generated justifications (not having to make individualized determinations about the temperament of dogs) may apply with sufficient force to warrant complying with the rule.

Since using rules has value, we can see why following rules may be preferable to full assessments of background justifications. But an intermediate strategy of decision may appear attractive, what Schauer calls rule-sensitive particularism.[24] The agent evaluates whether *the sum* of the substantive and rule-generated justifications warrants following the rule, and acts accordingly.[25]

Why might those designing institutions want agents to follow rules, even when the agents would make contrary decisions under a strategy of rule-sensitive particularism? Schauer urges that rules are jurisdictional devices, assigning responsibility.[26] Because rule-makers consider themselves more competent, or less biased, or more representative of people to be regulated (as legislators are more representative than administrative officials or judges), they may want to shift determinations to themselves and away from those who apply rules. The people who apply rules can, in turn, recognize the legitimacy of such institutional choices. It is not required that the agents *always* apply the rules,[27] but a rule will exert pressure for conformance even when the agent believes the balance of substantive and rule-generated justifications[28] points in the opposite direction.[29] Schauer says rules

24 *Id.* at 97.

25 Perhaps the agent would not need to make this assessment carefully in each instance, but if he were convinced that the sum of the two kinds of justifications did not warrant following the rule, he would not do so.

26 SCHAUER, *supra* note 1, at 159.

27 If the substantive justifications plus rule-generated justifications are extremely weak, or the countervailing reasons extremely strong, an agent may not follow a rule.

28 For this purpose, I suppose that the pure sense that the decision belongs to someone else does not count as a rule-generated justification. Otherwise, the practice of following rules might collapse into a rule-sensitive particularism that valued highly the jurisdictional aspect of rules.

29 Schauer talks as if fear of sanctions is enough to cause compliance with rules, in his sense. He does not notice that there is an analogy in sanction-motivated behavior to rule-sensitive particularism. In the latter, the agent does not comply if he thinks the justifications don't warrant it; in the former, the agent doesn't comply if he is certain the sanctions are no threat in that instance. I think this analogy raises some doubt whether someone who is motivated only by fear of sanctions, *and* who realizes they are not a genuine threat in every instance, is treating a rule as mandatory in Schauer's sense; but this doubt is not relevant to my topic here.

are essentially conservative (in a nonpolitical sense), because they shift determination to the past as opposed to the present and to the present as opposed to the future.[30]

In the latter part of the book, Schauer turns his attention to complex systems of rules, and especially law. Observing that instances may be covered by conflicting rules, he comments that if agents are to be significantly restricted, local rules, those addressing the situation most directly, must typically have priority.[31]

Schauer claims that mandatory rules must have linguistic formulations (or be capable of linguistic formulations), but there need be no single canonical formulation.[32] Thus, a rule may exist against males wearing hats in church, even though different people formulate the rule in different ways. Accordingly, common law rules may be mandatory despite the absence of canonical formulations.

The method of common law decision is more troublesome.[33] This method is sometimes presented as follows: when each new case arises, a court tests the application of a rule to the circumstances in light of the reasons for having the rule (and in light of countervailing reasons); if the justifications do not apply to the circumstances, the rule is qualified. On this model, the statement of a rule at an earlier stage has no special force; reevaluation takes place with each new situation. For Schauer, a rule that is constantly qualified in light of underlying justifications is not a mandatory rule. This model, however, is not a fully accurate picture of common law systems. Some common law rules have a firmer status than the model suggests. And, apart from formulated rules, what earlier courts have said about significant facts and about reasons carries weight with later courts beyond the intrinsic persuasiveness of the initial analysis. Thus, much material in the common law has the entrenched status of mandatory rules. Schauer recognizes that rules are more open within some common law systems than others, and that a judge's inclination to treat rules as mandatory may depend on the particular domain of law. (Schauer does not explicitly say that different judges within a single system have different attitudes about common law rules, but that obvious truth may be inferred from what he does say.)

In response to a skeptical view that judges decide on external grounds and use rules merely as rationalizations, Schauer notes that

30 SCHAUER, *supra* note 1, at 157–60.

31 *Id.* at 190–91. A system, of course, may have other priorities, such as for statutes over common law, and for newly adopted rules over old ones.

32 *Id.* at 64–71.

33 *See id.* at 176–87.

any plausible version of this claim is essentially about contested instances in particular systems, and about the psychology of those who render decisions within the systems.[34] Since people in general, and judges in particular, are capable of giving formulated rules more force than the skeptical view allows, that view cannot represent a truth about the *fundamental nature* of rules or of legal systems.

The notion that formulated rules have force does not itself resolve how the rules are to be *understood* when their coverage is in doubt; will the original understanding of the rule-makers control (if it can be ascertained) or will the contemporary understanding of either those who are subject to the rules or those who apply them control?[35] Schauer contends that this determination must be made in light of the value of rules within a particular system.[36]

Whatever the exact method for understanding whether a rule covers a situation, Schauer is at pains throughout the book to emphasize that this question of interpretation is *not the same* as the determination whether, overall, the rule should be followed in that instance.[37] Deciding that a rule is overridden is not the same as deciding that it really does not cover the situation. If the rule is "No dogs allowed," the rule *covers* seeing-eye dogs, although an agent might decide that the rule should be overridden when a blind person shows up with a seeing-eye dog. Schauer challenges those scholars, most notably Ronald Dworkin, who conflate how a rule should be interpreted with whether it should be applied in particular circumstances.

In trying to characterize our legal system in terms of the general debate over the nature of the law, Schauer offers the label "presumptive positivism."[38] There is a presumption that norms within the system will be followed, but in exigent cases, judges and others will draw on extra-system values to override internal rules.

My barebones summary of Schauer's claims leaves out a great deal of rich material, but it does expose many of his central ideas, and it suffices for my purpose of relating these ideas to what he says about meaning. Before proceeding to what he writes about meaning, I need to develop further a distinction that Schauer draws, one that will emerge as important in my subsequent analysis.

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34 *Id.* at 193–96.

35 Of course, in a sense contemporary understanding must control, but that understanding can be directed toward another, earlier understanding as the basis for decision.

36 SCHAUER, *supra* note 1, at 219.

37 *E.g.*, *id.* at 211–12.

38 *Id.* at 196, 203–04.

What exactly is his line between rules of thumb and mandatory rules? Schauer says rules of thumb have normative force, as, of course, do mandatory rules. Rules of thumb and mandatory rules both often serve as short-cuts for an agent's own analysis of underlying factors. Some rules of thumb are followed unless an agent is *convinced* that a contrary course is justified; these, like mandatory rules, lead agents to act against what they deem to be the balance of considerations. The crucial difference concerns situations in which the agent is convinced that the underlying justifications do not support following the rule. A rule of thumb then exerts no pressure; a mandatory rule continues to exert pressure towards compliance. (Remember, Schauer does *not* say mandatory rules must be absolute; an agent need not take a rule as the final word, and rule-makers may not want that.) As so explicated, there *is* a difference between a weak mandatory rule (not exerting much force) and a fairly powerful rule of thumb (often followed because agents are not competent to do the calculation of underlying factors, or because they are not *convinced* the rule is unsupported by its underlying reasons). But the difference is subtle.

How can we *tell* if a rule is a rule of thumb or mandatory rule? It is clear that what one agent *takes* as a mandatory rule, another agent may *take* as a rule of thumb. Given Schauer's determinedly agent-centered, subjective approach to reasons for action (one with which I disagree in part),[39] the same rule can be a mandatory rule for one person and a rule of thumb for another. (Of course, yet another person, say a judge, may penalize the second person for not complying with the rule.) If we examined two different (legal or other) systems of rules, we might find that similar substantive formulations operated mainly as mandatory rules in one system and rules of thumb in the other.

Is it possible that the same agent in the same system might treat a rule partly as mandatory rule and partly as rule of thumb?[40] Schauer does not entertain this possibility, but none of his analysis precludes it. How could we tell if an agent had this attitude? Obviously, it would not be enough that the agent sometimes complied with the rule and sometimes didn't; a pattern of occasional compliance could fit either "rule of thumb" status or (weak) "mandatory rule" status. We would

39 *See id.* at 113, 121. Briefly, if there is a God, and God establishes principles for all human beings to live by, I think it would be odd to say that such principles fail to provide reasons for action, if one does not recognize them. I believe the same is true for basic principles of human morality, independent of any religious support, but that is a more complicated subject.

40 Of course an agent might change her attitude about a rule, but I do not mean that.

need to go deeper into the agent's motivations. Suppose the agent said the following: "Across some part of the rule's coverage, I would follow the rule even if I thought its underlying justification were inapplicable, unless I had very *strong* reasons not to comply; across another part of the rule's coverage, once I decided the underlying justifications did not apply, I would act contrary to the rule if I had the *slightest* reason to do so." If the agent had this attitude, he would be treating the formulated rule partly as mandatory, partly as a rule-of-thumb.

I have shown that it is *logically possible* for an agent to have this divided view about a single formulated rule. But I have not yet shown that that could be a *coherent attitude.* Nor have I yet shown why this possibility matters for the subject of my paper. Making those demonstrations now would get too far ahead of my analysis, but they will appear in a later section.

IV. SCHAUER ON MEANING

Professor Schauer indicates that his analysis of rules rests on certain truths about meaning and does not fit within competing approaches to meaning.[41] He says:

> My analysis of the concept of a rule is incompatible with . . . a particularistic understanding of meaning, and assumes instead that the meaning of language is not wholly explained by the unformulated purposes for which a speaker employs that language, nor wholly explained by the particular context in which that language is used. In other words, the potential divergence between rule and justification assumes both that language and meaning are at least partially acontextual.[42]

Without trying to settle the source of the phenomenon, Schauer relies on the *semantic autonomy* of language. "[S]omething, call it what you will, shared by all speakers of a language . . . enables one speaker of that language to be understood by another speaker of that language even in circumstances in which the speaker and understander share nothing in common but their mutual language."[43] Widely shared understandings provide a *universal context* or *baseline context.* According to Schauer, a communication's "'acontextual' [meaning] can also be called 'literal' or 'plain.' It is often called 'utterance

41 This linkage is striking in light of the philosophical questions he tells us he need not resolve, including what is the best approach to morality, whether people have an obligation to obey the law, and major issues about reasons for action.

42 SCHAUER, *supra* note 1, at 55.

43 *Id.* at 55–56.

meaning' as distinguished from 'speaker's meaning'."[44] He writes that "the view of language I employ is central to my analysis."[45]

Schauer has harsh words for a "totally particularistic theory of meaning, under which the meaning of an utterance is completely a function of what that utterance is designed to accomplish on a particular occasion."[46] That theory "cannot explain how it is that communication is possible. If the meaning of an utterance were entirely a function of how it was *then* used . . . it would be impossible to explain how meaning is conveyed."[47]

Schauer worries about resistance to the notion of semantic autonomy among legal theorists, most prominently Lon Fuller. Fuller argued against H.L.A. Hart that terms do not have core meanings independent of the purpose for which they are employed. Taking an example of Hart's, Fuller suggested that a rule of "No vehicles in the park" would not cover a statue using a World War II military truck.[48] Nor would a rule against sleeping in any railroad station cover a man who "nods off" as he is sitting and waiting at 3:00 a.m. for a delayed train.[49] Schauer suggests that the impetus for Fuller's view is: "If meaning can diverge from purpose, then application of that meaning may produce results inconsistent with that purpose, even to the point of absurdity."[50] Fuller has adopted a particularistic approach to meaning that makes meaning "a function of how an item of language is used on a particular occasion by a particular speaker."[51] Schauer complains that Fuller's notions of how judges should decide cases "ought not to be disguised in an implausible theory of meaning."[52] Schauer also offers an alternative explanation of Fuller's basic position. Fuller may view generalizations as defeasible rather than entrenched; the letter of rules should yield to "the purposes of their

44 *Id.* at 58. "Utterance meaning" is compared with "sentence meaning" and is given a more contextual twist in Michael S. Moore, *A Natural Law Theory of Interpretation*, 58 S. CAL. L. REV. 277, 290 (1985). *See also* Paul F. Campos, *This Is Not a Sentence*, 73 WASH. U. L.Q. 971–72, (1995) (referring to various linguistic theorists that rely on that distinction).

45 SCHAUER, *supra* note 1, at 61.

46 *Id.* at 58.

47 *Id.*; *see also id.* at 219.

48 Lon L. Fuller, *Positivism and Fidelity to Law—A Reply to Professor Hart*, 71 HARV. L. REV. 630, 662–64 (1958), *noted in* SCHAUER, *supra* note 1, at 59.

49 *Id.* at 664, *noted in* SCHAUER, *supra* note 1, at 212.

50 SCHAUER, *supra* note 1, at 59.

51 *Id.*

52 *Id.*

underlying justifications."[53] In other words, "intention or purpose should trump acontextual meaning."[54]

Schauer conceives realist approaches to meaning as presenting a stronger challenge to his view than does pure contextualism. For realists (not to be confused with legal realists), "the factual predicate of a rule is not to be defined conventionally, but instead according to the best current understanding of the terms involved."[55] Thus, the meaning of "natural kind" words like "water" remains the same even as the understanding of the qualities of water varies. As Schauer points out, the realist approach bears significantly on prescriptive rules only if moral terms and other theory-laden terms are similarly conceived. If such terms "presuppose the purposes of the enterprise, such as law, within which the rules operate"[56] and one purpose is avoiding "results inconsistent with substantive justifications undergirding a rule, then the meaning of a rule using those[57] The realist approach suffers the same flaws as the particularistic one; it "embeds in a theory of meaning what turns out to be a substantive theory of the goals of a particular kind of decision-making environment."[58]

The subject of meaning reemerges when Schauer turns to legal interpretation. Discussing Ronald Dworkin's stress on underlying justifications in judicial decision, Schauer doubts that rules have much resistance (against justifications) in Dworkin's model.[59] Dworkin's arguably accurate portrayal of American legal practice merges the question of what judges should do with that of determining what a rule *means*.[60]

Against competing approaches, Schauer emphasizes the difference between determining what a rule means and whether, all things considered, it should be followed. Both the realists and Fuller, he says, "take the definition of terms to be coextensive with the goals of the system in which those terms are used."[61] As applied to terms with an existence outside the system, this approach "appears incoherent"; for terms existing only within the system, the approach is a "plausi-

53 *Id.* at 74.

54 *Id.* at 74 n.32.

55 *Id.* at 60; *see, e.g.*, David Brink, *Legal Theory, Legal Interpretation, and Judicial Review*, 17 PHIL. & PUB. AFF. 105 (1988); Moore, *supra* note 44, at 277. Moore discusses different kinds of terms in Michael S. Moore, *The Semantics of Judging*, 54 S. CAL. L. REV. 151, 202–46 (1981).

56 SCHAUER, *supra* note 1, at 61.

57 *Id.*

58 *Id.*

59 *Id.* at 210. *See generally* RONALD DWORKIN, LAW'S EMPIRE (1986).

60 SCHAUER, *supra* note 1, at 211–12.

61 *Id.* at 218.

ble . . . theory of adjudication masquerading as a theory of meaning."[62]

The truth "that language has meaning independent of what its initial users . . . intended" establishes that "recourse to original intent cannot plausibly be taken as a linguistic necessity."[63] If original intent about rules is to control, it must be because of the substantive reasons for having rules, not because of the nature of meaning.

To summarize what Professor Schauer says about rules and meaning: The crucial aspect of mandatory rules is that they exert pressure for conformance even when their justifications do not apply (or when countervailing reasons are strong enough to call for contrary behavior). Frequently a wedge exists between a rule's meaning and the coverage of its justifications, a wedge that may sometimes yield even absurd results if the rule is followed. Powerful arguments exist for sometimes not following rules; but theories of meaning that conflate the formulation of a rule and its justifications—theories that deny the truth of semantic autonomy—obscure the difference between discerning a rule's meaning and deciding whether or not to follow it in the circumstances. Schauer, thus, presents his major claims about mandatory rules as dependent on the thesis of semantic autonomy.

V. Understanding Rules and Theories of Meaning

The burden of this section is to show that Schauer's main insights about rules can be embraced by those adopting opposed views about meaning. However, as we shall see, disagreements about how to characterize strategies of decision do have practical importance for law.

A. Fuller's Purposive Approach to Meaning

I first address Fuller, who suggested that meaning cannot be understood apart from purpose. Certainly Fuller was correct that sometimes we cannot know what a word, or even a sentence, means unless we know the context. If we read, out of context, "I saw her duck," we cannot know if the sentence is about a woman ducking or about a duck she owns.[64] On the other hand, Schauer rightly supposes that some prescriptive sentences can be substantially understood without any reference to purpose. If a sign says, "No living dog or cat is permitted in this house," we do not need to know why the owner does not

62 *Id.*

63 *Id.* at 219.

64 This example was used at the Law and Linguistics Conference, by Clark Cunningham and Georgia Green. *See Proceedings, supra* note 2, at 858.

want dogs and cats to recognize that they are not welcome.[65] What divides Schauer from Fuller is whether purpose should be taken as an aspect of meaning,[66] when people can understand purpose but the words of a rule can be given content without reference to purpose. Fuller says "yes," Schauer says "no."[67]

Does Fuller's perspective on this question preclude acceptance of Schauer's account of rules? Schauer offers substantial reasons for having rule formulations. These formulations simplify later decisions and provide greater predictability about results than would otherwise be possible. Someone in authority might reasonably have a purpose to create a rule for others that has normative force. If Schauer is right that mandatory rules can reduce errors among subsequent decision-makers and can reserve policy decisions to appropriate persons, rule-makers might want a rule followed even when those called to apply it think the combination of substantive and rule-generated justifications does not warrant its application. Rule-makers might, therefore, opt against the procedure Schauer calls rule-based particularism. They might try to create a mandatory rule that is not completely "transparent" to its substantive justifications combined with its rule-generated justifications. Part of the purpose of those who pass an ordinance that says, "All dogs in the park must be on leashes," is to assure that officials may apply the rule without examining whether a particular owner can manage her dog well without a leash.[68] Just as rule-makers could aim to create mandatory rules, rule-appliers could grasp this purpose and accept its legitimacy. Were everyone within a system to do so, mandatory rules could have wide significance. One can believe that meaning must be understood in light of purpose and also grant that the meaning of a rule could relate to justifications in just the way Schauer describes.

Schauer might answer that I have missed the point about Fuller. After all, Fuller claims that the monument with a military truck does not violate the ordinance against vehicles in the park, and he also

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65 Of course, one might say the *purpose* is to keep out dogs and cats, but any prescriptive sentence carries the purpose to prescribe particular behavior. That purpose is no more revealing than the bare prescription.

66 The issue is whether purpose counts for the ordinary meaning of what the rule covers; obviously purpose is relevant to the level of meaning concerned with the aims of the rule. *See supra* note 2 and accompanying text.

67 More precisely, Schauer says "no" if the literal meaning of the rule's words apply. Schauer does not bar reference to purpose if competing claims based on ordinary meaning are equally strong.

68 This is an illustration I discuss in KENT GREENAWALT, LAW AND OBJECTIVITY 32–44 (1992).

claims that the man who is sitting up waiting for his late train and has drifted into sleep has not violated a rule against sleeping in railroad stations. Do not these examples show that Fuller thinks that a rule should be tested against its substantive purposes in each application? Further, do not these examples show that Fuller's idea of purposive meaning itself excludes the possibility of mandatory rules that exert pressure against their justifications?

My response is that Fuller's examples can be read to have much less sweeping implications than Schauer attributes to them.[69] Someone asked whether the relevant rule applies to the military truck or sleeping man, might answer:

> Whether I ask about the actual people who made the rule or about reasonable people who might construe such a rule, I cannot conceive that they would want it applied here. Granting the rule-makers wanted to constrain individualized determinations, this situation lies beyond any coverage an actual (or reasonable) rule-maker conceived or would desire.[70]

Schauer talks occasionally about "absurd" applications of rules; his position is that if the literal words of the rule embrace the situation, the rule covers it, whether or not rule-makers would have conceived or wanted the rule followed.

Schauer's disagreement with Fuller raises a double question of how rule-appliers should act and how they should understand a rule's meaning. Fuller regards it as obvious that absurd applications are to be avoided;[71] Schauer sees some value in absurd applications, but never argues that officials should usually follow rules when their applications would be absurd. Schauer also avoids any general position on how much officials should look to substantive justifications when results would not be absurd, though he perceives benefits from sticking to the literal words.

Fuller and Schauer have a definite disagreement about meaning. Fuller does not think the meaning of a rule covers situations that are evidently outside the range that anyone would conceive or want. For Schauer, who equates "literal," "plain," and "utterance" meaning, a

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69 I am not a confident explicator of Fuller's exact position; he does not develop the examples to face the precise issue that concerns Schauer.

70 The question is not only whether these rule-makers would have wanted *this result.* A city council might want no statues in the park, and thus might not want the military truck monument. But it would not aim at such an objective with an ordinance against vehicles in the park.

71 Nevertheless, Fuller's purposive approach to meaning does not itself necessarily bar absurd applications, if the purposes underlying a rule, with the reasons for *having a rule,* embrace them.

rule may have a meaning that neither the actual rule-maker nor any reasonable rule-maker might conceive.

Does anything practical turn on the debate over meaning? I will suggest in a later section that the answer is "yes," but here I want to show that the difference over meaning has no *necessary* consequences for what someone applying a rule decides to do. A Fullerian official ascertains that use of the "no vehicle" rule to forbid the truck monument was not conceived and would be absurd.[72] Once he reaches that resolution, he will give the rule no force, and even a very slight reason to include the truck monument will be sufficient to permit it.[73] Will the follower of Schauer who thinks the rule covers the truck monument take a different view? We might initially suppose that he will apply the rule, absent a strong reason not to do so. But this initial supposition *might* be mistaken. This official might treat the rule as having no more force than a rule of thumb if the application was unconceived and would be absurd;[74] he might take the rule as mandatory only across the range of coverage that might be within its broad purposes (including rule-related purposes). Thus a decision-maker who fully accepts Schauer's conceptual apparatus *might* behave as would Fuller in his two examples.

Schauer does not recognize how closely a variation on his alternative reading of Fuller might approximate Schauer's own conceptual view. According to Schauer's alternative reading, Fuller believes intention trumps acontextual meaning.[75] If this trumping is limited to extreme cases (of absurd applications), it amounts to the approach I have just sketched—an official treats a rule formulation as a mandatory rule in the main range of its coverage and as something less at the extreme edges. This approach observes the major practical restraints Schauer emphasizes and is fully compatible with his conceptual structures.

Before moving on, I want to reiterate the main point in this discussion of Fuller. Whatever may divide him from Schauer, someone

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72 In this sense coverage could be conceived if it was conceived that the statute would apply to many particular situations which were not conceived, and this situation fell in that general class.

73 Another possibility would be that a court would exercise *no review* over the reasons for a statute, once having determined that the rule does not apply.

74 It may be odd to think of a rule as being a rule of thumb only when it is not followed, but the critical point is that the rule is not being treated as mandatory in this range.

75 SCHAUER, *supra* note 1, at 74. Schauer here treats Fuller as looking at purposes in terms of subjective intentions. Purpose might be regarded more "objectively," as it is by HENRY M. HART & ALBERT M. SACKS, THE LEGAL PROCESS (1994).

can adopt a generally purposive approach to meaning and also accept Schauer's basic points about the nature and operation of mandatory rules.

B. Contextualism

Professor Schauer urges strongly that someone who believes that meaning is completely contextual cannot accept his account of rules.[76] A contextualist maintains that the meaning of any word or sentence cannot be determined apart from context. The position may be given an "intentionalist" slant, in which event meaning always comes down to the speaker's intentions.[77] Or it may be cast in terms of how a well-informed listener would take an utterance in context. Suppose I want the door shut, and I "slip" and say, "Please shut the window." According to a pure intentionalist approach, my utterance *means*, "Please shut the door." According to a well-informed listener approach, it means, "Please shut the window."[78]

It is well at the outset to put aside one objection that Schauer raises, namely that a totally particularist theory of meaning "cannot explain how it is that communication is possible." No one doubts that when people learn a language as children or later in life, they are instructed about how words are generally understood by those who speak that language; they become educated in conventional meanings. When people communicate, they try to use words that others will understand about in the same way they themselves do.

In *this sense,* no one denies that the meanings of words are general and intersubjective to a high degree. What the particularist or contextualist claims is that when someone makes an utterance, its meaning depends on context. For an intentionalist, that meaning is the same as speaker's meaning, a meaning that might vary considerably from an ordinary (conventional) sense of the terms the speaker uses.[79] A similar divergence might exist according to an informed listener's approach, *if* that approach focused on what a listener would believe the speaker is trying to communicate *and* the informed listener would know of the speaker's odd uses of words. It is arguable

76 *See* SCHAUER, *supra* note 1, at 55–59.

77 For someone who takes this position, see Paul F. Campos, *supra* note 44, at 971. *See generally* Paul Campos, *That Obscure Object of Desire: Hermeneutics and the Autonomous Legal Text,* 77 MINN. L. REV. 1065 (1993).

78 This assumes a window is available to be shut and a request to that effect would not be absurd.

79 Someone learning a new language might use words in quite a "mistaken" or idiosyncratic way.

that "semantic autonomy,"[80] which gives a place to the conventional meaning of words and sentences even when these differ from what a speaker means and from what an informed listener might apprehend, fits better with human communication than pure contextualism. But we should not suppose the basic realities of human communication simply give the lie to contextualism.

The more fundamental difficulty with Schauer's dismissal of contextualism is that he (apparently) misses a distinction between two stages at which contextualism can come into play. He supposes that someone committed to contextualism in meaning must support particularism in decision-making, but that is a fallacy.[81] Suppose I say to two children on separate occasions, "Never cross the highway in front of our house." One child is a four-year-old boy, the other is a fourteen-year-old girl. What does "never" mean in the two sentences? The girl might reasonably suppose that *if* she sees the boy running across the highway, she should follow him and bring him back. The boy might conclude that "never" means "never," that if he thinks bad things are happening, he should return to the house and tell a parent or babysitter. Indeed, I might by tone of voice and additional words try to convey this to the boy. "I *mean never.* Whatever is going on, come back to the house and tell us. No matter what you see happening, *do not ever cross that road.*"[82] In context, the "never" in the communication to the boy is more absolute than the "never" spoken to the girl.

The example's main point is that the context of the utterance of a rule may show that the rule is to be taken as absolute, or nearly so, not permitting judgments of degree by subsequent decision-makers. If they respect the authority of the rule-makers and sensitively respond to the context in which the rule was formulated, they will refrain from exercising their own judgments about how to handle situations. Schauer's reasons for having and following rules are practical ones that could persuade someone who thinks meaning is completely con-

80 At least *some* of what Schauer says about semantic autonomy, *see* SCHAUER, *supra* note 1, at 55–58, could be accepted by contextualists. *See* William D. Popkin, *Law and Linguistics: Is There Common Ground?*, 73 WASH. U. L.Q. 1043 (1995), raises the question of *how much context* bears on meaning.

81 I do not deny that these positions are congenial with each other, but one does not follow from the other.

82 At the Law and Linguistics Conference, Schauer used such an example. *Proceedings, supra* note 2, at 943–44. Michael Geis suggested that words like "all" are virtually always "restricted quantifiers," not really meaning "every single one." *Id.* at 843–45. Laurence Horn points out that the same is true for negative quantifiers, like "no." Laurence R. Horn, *Vehicles of Meaning: Unconventional Semantics and Unbearable Interpretations*, 73 WASH. U. L.Q. 1145, 1147 (1995).

textual. Simply put, belief in contextualism or particularlism *about meaning* is compatible with accepting rules as rigid and nearly absolute. Contextualism as a position about meaning need not imply that decision-makers should inevitably adopt contextual strategies of decision, weighing all possibly relevant factors.

C. Realism

The analysis of how realism in meaning bears on rules is closely similar. Someone who thinks terms carry a natural meaning that is not reducible to conventions in language may still believe in the usefulness of many general rules that constrict decision-makers. Many rules of law are highly technical; a realist about meaning might well suppose that a rigid application of these, one that leaves little room for individual judgment, is desirable. A more serious question exists when an official must apply a rule whose crucial terms have moral overtones or are theory-laden. If realists believe, as Schauer says, that meaning then depends on moral evaluation or evaluation of the purposes of the enterprise, does it follow, as Schauer also suggests, that the meaning of a rule "will collapse into the meaning of its substantive justifications"?[83]

Schauer moves too quickly to his conclusion about a collapse. Even if avoiding results at odds with substantive justifications is *a* purpose of a legal system, it does *not follow* that the meaning of a rule will "collapse" into the substantive justifications. That is because *another purpose* of a legal system, or other system of rules, may be to achieve the benefits of rule-guided decision. The two purposes will sometimes conflict, and insisting that meaning must reflect purpose does not by itself produce a resolution of this conflict.[84] Within the law, or almost any imaginable system, some people will have to accept the judgments of others about how a rule should be understood. Realism about meaning can produce a decision strategy *only* if linked to judgments of role allocation.

To illustrate, the term "unreasonable search and seizures" has moral overtones and is theory-laden. In our system, judges decide what count as unreasonable searches, and in this judgment they do not rely finally on the views of those who adopted the Constitution or on some conventional understanding of the term's coverage within modern society. Decision about "unreasonable searches" seems to exemplify the realist approach. But suppose the Supreme Court has clearly indicated by a unanimous recent decision that a particular

83 SCHAUER, *supra* note 1, at 61.

84 *See, e.g.*, Moore, *supra* note 44, at 384.

kind of search is unreasonable. In our system, other judges and executive officials are expected to comply with that view. Even on a question about the constitutionality of a search that has not been resolved judicially, we expect lower administrative officials, for example, police on the beat or welfare workers, to comply with the expressed determinations of their superiors that a search is impermissible. In short, no one advocates a system in which all affected persons resolve for themselves how a theory-laden term should apply.[85]

Imagine a realist about meaning who is a district court judge (after the Supreme Court has ruled) or a police officer (after departmental directives have forbidden a form of search). She might say,

> If you ask me what is the *real meaning* of the term 'unreasonable search,' as applied to this search, I believe the search is not unreasonable, but my role, supported by substantial values in governance, is not to ask that question in these circumstances. For practical purposes, I accept the judgment of my superiors.

No theory of meaning, by itself, can resolve who should decide about meaning in a practical system of governance. As we have seen, Schauer's concept of meaning is consistent with leaving wide discretion to judges whether to follow rules. One *could* be a realist about meaning and believe not only that many mandatory rules have considerable value, but also that present judges should defer to earlier judges, or administrative agencies, or legislatures about how rules apply, even if doing so is to go against the *real meaning* of those rules.[86]

Both particularlism and realism about meaning have an *affinity* with multifactor judgments by decision-makers; to that extent Schauer is certainly on sound footing. Nevertheless, his basic points about rules are compatible with each of those views of meaning; and proponents of those views consistently could endorse most of what Schauer says about rule-guided decision.

VI. Meaning and Law

In this section, I turn to how we should best understand meaning in law. Although I have argued that different perspectives about meaning can accommodate Professor Schauer's basic insight about

85 I have mentioned situations in which a prior determination has been made. But even if no one has yet made a determination, some lower officials would be expected to ask permission rather than rely on their own judgment.

86 Michael Moore strongly argues that courts not be constrained by how legislatures, and others, suppose rules will apply, but he understands that it is necessary to offer substantive moral arguments for that position. *See* Moore, *supra* note 44, at 381–96.

rules, nonetheless issues of considerable significance remain. A broad question is whether meaning in law should coincide with the ordinary linguistic meaning of rules of law. A more focused question is whether Schauer's highly literal approach to the meaning of a rule is persuasive for our legal system. I believe it is not. Some of the reasons I offer cast doubt on whether such a literal approach is appropriate for "the meaning of a rule" in any setting. Other reasons suggest that no approach that focuses exclusively on ordinary linguistic meaning will suffice for legal meaning, barring fairly radical changes in premises of our system.

A. Clarifications About Forms of Inquiry and Possibilities

We need to understand at the outset that an inquiry about meaning could be descriptive, prescriptive, or something we might loosely call conceptual. If we adopted the descriptive approach, we would try to figure out how people generally, or people in a particular field, speak of meaning. We know that people talk of what "a speaker meant" and "what these sentences meant to me"; and after conversational misunderstandings one person may say, "anyone would have understood what you said as I did," a way of referring to meaning for a reasonable listener. But do people widely have some idea of what a communication really means, and if they do, is it reducible to one of these senses of meaning or something else? If most people have very hazy ideas on this subject, would they come to clearer conclusions on reflection, and would these be shared.[87]

A prescriptive approach would ask what meaning of meaning will serve us best, by contributing to clarity of thought or yielding desirable practical consequences. (These two objectives are not only divisible in theory, they may point toward different conceptions of meaning.) One might well combine descriptive and prescriptive approaches under some principle that a defensible understanding of meaning should have substantial support in present views, but that prescriptive judgments should resolve uncertainties and divergences.

Finally, one's approach to meaning might be conceptual. Starting from some basic core of an idea of meaning, one might conclude that faithfulness to that basic core requires that meaning be understood in a certain way. For example, given the realist view that the meaning of theory-laden concepts is in accord with the best under-

87 Most people probably have a very dim idea about what "meaning" means in the abstract. However, one might inquire whether they would think the "meaning" of "death" changes if our ideas of just when someone dies change. *See id.* at 293–301, 322–23.

standing of the values they represent, the meaning of meaning might be so conceived. That is, one might say meaning in general must be understood in the way that best fulfills the values of a concept of meaning. I take such an approach as close to a prescriptive approach, and will not treat it separately.

In thinking about meaning, one might seek a sense that is universal, at least for linguistic utterances within the English language,[88] or one might assume that the meaning of meaning will shift according to domains of discourse. Schauer adopts a general approach.[89] Ronald Dworkin, by contrast, argues that meaning should be understood in light of the fundamental objectives for a domain of discourse; the meaning of works of art should be taken to be what will make them the best they can be aesthetically, the meaning of legal standards should be based on judgments of political philosophy.[90] If one is engaged in a descriptive inquiry, one would almost certainly find that people are pulled in both directions. On the one hand, they suppose that what a passage of writing means does not depend exactly on what kind of writing it is;[91] on the other hand, many people would identify the meaning of an ordinary letter more nearly with the writer's meaning than they would do with the meaning of a poem.

A third important distinction is between meaning for theoreticians and meaning for practitioners. Perhaps those who are interested in conceptualization and a refined theory of meaning will best adopt a view of meaning at variance with the best view for actual decision-makers. One reasonable option for a theoretician would be to reject any single approach to meaning.[92] He might talk of the meaning of those who issued the rule, the meaning decision-makers ascribe to it, and the meaning reasonable readers give it, but he would claim that the rule itself has no definite meaning, or has many alternative meanings. Barring a large shift in our discourse, this is *not* an option for the decision-maker; she needs to resolve whether the meaning of the rule covers the situation at hand.[93] If it does not cover the situa-

88 A closely related question would be whether other languages have concepts so nearly identical that whatever one concluded for English "meaning" one would find dispositive for those concepts in other languages.

89 However, he may leave room for some divergences with respect to matters he does not discuss.

90 *See* Ronald Dworkin, *Law as Interpretation*, 60 TEX. L. REV. 527 (1982).

91 One undertaking a descriptive inquiry would need to decide how much weight to give to experts as contrasted with ordinary people.

92 *See* QUINE, *supra* note 8.

93 As Lawrence Solan points out, legal institutions press for either-or choices, whereas many concepts are indeterminate at the margins. Lawrence M. Solan, *Judicial Decisions and Linguistic Analysis: Is There a Linguist in the Court?*, 73 WASH. U. L.Q.

tion, the decision-maker may decide that consequences the rule specifies should proceed in any event; but in the law, as Schauer points out, judges are often hesitant to expand a rule's effective coverage in this way.[94]

B. Doubts About Literalism

Although Schauer presents highly literal meaning as obviously the right sense of meaning, its place is much more arguable. Everyone agrees that for many uses of language, jokes and metaphors among them, words often are not to be taken literally. If someone says, "I'm freezing," we do not suppose his temperature is close to that at which human bodies freeze, or that he thinks that. The context of utterance often bears on whether meaning is literal.

Schauer would probably respond that meaning is literal unless it is evidently nonliteral, and rules are rarely, if ever, evidently nonliteral. Therefore, the meaning of rules accords with literal meaning. Things are not so easy, however. Early in this essay, I imagined a parent (P) who told a teenage child (TC), "Don't go out at night." This use of language is not figurative in the manner of "I'm freezing." Yet, what would we say if TC escapes from a fire in the house at 2:00 a.m.? Would we say, as apparently Schauer would, "She did not follow P's direction, but that was justified," or "P's direction didn't cover fires in the house; it didn't *mean* she should stay in the house if her life was endangered by a fire."? This example brings us back to Fuller's approach to the sleeping railroad passenger (and the truck monument). We can, of course, understand that the sleeping man *is sleeping* according to a literal, acontextual, nonpurposive meaning of sleeping. But should we say that *the utterance meaning* of the rule covers this situation if anyone would dismiss application of the rule to these circumstances as absurd? Should the *utterance meaning* be at odds with the apparent understanding of the speaker and with how a reasonable reader would take the utterance?[95] Why not say that *the utterance meaning* may vary from a highly literal reading of the words? For unconceived, unwanted, "absurd" applications, Schauer's claim that utterance mean-

1069, 1073–80 (1995). I suggest that the need for an either-or choice enhances the possibilities for determinate answers to legal questions in GREENAWALT, *supra* note 68, at 80–81.

94 Courts do not assert jurisdiction that has not been granted them (though they may decline to exercise jurisdiction), and it is a principle of American criminal law that all crimes must be established by statutes.

95 Even a reasonable reader who knew little about the background circumstances of the ordinance might be sure that no one would want to prevent ordinary passengers waiting for trains from "drifting off" occasionally.

ing is acontextual, literal meaning seems less appealing than the idea that (ordinary) meaning is reasonably understood in light of obvious purposes.

Schauer has an instructive comparison between conversations and rules issued at a single point in time. He points out that conversations allow people to refine generalizations as various circumstances are brought to view.[96]

A: "No dogs in the restaurant."

B: "Do you really mean to exclude seeing-eye dogs, who are trained to be extremely well behaved? If you do, many blind people will not be able to eat here."

A: "Of course not, I regard seeing-eye dogs as different."

Now, on Schauer's account, A's first statement includes all dogs; his second represents a modification or qualification. But why not say that the meaning of the first statement does not really include items that we are virtually certain would be excluded in the first conversational gambit?[97] Such an approach may make even more sense when conversation is impossible, and that approach could easily cover Fuller's sleeping traveler. Schauer is on solid ground when he claims that some meaning is partly acontextual, but he leaves the moorings of self-evidence when he asserts that utterance meaning is highly literal. Perhaps aspects of his own theory of meaning are as much the product of his substantive views about rules, as are the theories of meaning of those he criticizes for presenting theories of decisions "masquerading as theories of meaning."

C. The Meaning of Rules in American Law

How should we understand the meaning of rules in American law? The traditional understanding of the relations between courts and legislatures and between higher and lower courts affords us a point of entry. According to the doctrine of legislative supremacy, courts are supposed to apply statutes unless they are unconstitutional. The court that announces a principle of common law or constitutional law has considerable freedom to revise it in a subsequent case, but lower courts have less latitude to adjust the standards of established precedents. A court interpreting a statute or the recent firm precedent of a higher court will not commonly say, "The applicable rule covers the situation at hand, but this is such an extreme case, we

96 SCHAUER, *supra* note 1, at 39–41.

97 Thus, if someone says, "Teach the children a game," we may take the context as excluding blackjack for money, SCHAUER, *supra* note 1, at 39–41, if we are sure blackjack would be excluded with the first question.

have decided not to follow the rule." The court may say something like, "The literal language of the rule seems to cover this situation, but we cannot imagine that anyone conceived or would want this consequence, so we *construe*[98] or *interpret* the rule not to have this effect." Even if the court does not use the word "meaning," its language falls closer to an assertion that the real meaning of the rule is not to be traced by its literal terms, than it does to Schauer's preferred alternative of a court's acknowledging actual coverage of the (mandatory) rule and then explaining why it is not following the rule.

Some doctrines and branches of law contain their own provisions for extreme cases. A number of principles of constitutional law allow departures from standard requirements in exigent circumstances or upon a showing of a compelling interest. With such principles, a court can find that prohibitory terms apply, but that someone (usually the government) is justified when special conditions are satisfied. More interesting for our purposes is the general justification defense in criminal law, which all (or nearly all) American states entertain in some form. That defense allows a person to violate a specific provision of the criminal code if the reasons are powerful enough.[99] To take an oft cited example, people stranded on a mountain in a blizzard may break into a private cabin and take food.

The presence or absence of a general justification defense may well affect how one looks at a particular prohibition like that regarding vehicles in the park. Imagine that an ambulance, sirens blaring, enters the park to save a victim of a beating.[100] A functioning ambulance is undeniably a vehicle, it moves within the park like a vehicle (unlike the military truck on the monument), it disturbs those in the park and poses some risk to their safety. If a general justification de-

98 For suggestions that courts should be understood as "construing" language, see *Proceedings*, *supra* note 2, at 891–93; Peter M. Tiersma, *The Ambiguity of Interpretations: Distinguishing Interpretation from Construction*, 73 WASH. U. L.Q. 1095, 1097–99 (1995).

99 In some jurisdictions, the defense of duress serves this purpose for human threats, the general justification defense being limited to natural dangers. I comment on the general justification defense in Kent Greenawalt, *Natural Law and Political Choice—The General Justification Defense, Criteria for Political Action and the Duty to Obey the Law*, 36 CATH. U. L. REV. 1, 2–26 (1986); Kent Greenawalt, *A Vice of Its Virtues: The Perils of Precision in Criminal Codification, as Illustrated by Retreat, General Justification, and Dangerous Utterances*, 19 RUTGERS L.J. 929, 937–42 (1988).

100 This example is discussed in *Proceedings*, *supra* note 2, at 839–50. *See also* Jim Chen, *Law as a Species of Language Acquisition*, 73 WASH. U. L.Q. 1263, 1293–95 (1995); William N. Eskridge, Jr. & Judith N. Levi, *Regulatory Variables and Statutory Interpretation*, 73 WASH. U. L.Q. 1103–11 (1995).

fense is applicable,[101] a court can comfortably say that the ordinance was violated, but justifiably so. Its task is more difficult if no such defense applies. Then it *may* say that the ordinance contains an implicit qualification, that it does not really cover ambulances that must enter the park on errands of mercy.

For many legal rules, no explicit exception for exigent circumstances is built in, and nothing like the general justification defense applies across the board. As to these rules, the tension between existing practice and Schauer's conceptualization is most troublesome. The reality of that practice is a greater impediment to adopting Schauer's endorsement of literal meaning than any independent theoretical views about meaning.

Schauer's approach to the ambulance example, as well as the military truck and the sleeping man examples, is straightforward. The rule applies. A decision must then be made whether to follow the rule. *Perhaps* the rule should not be followed, although there is often some value in following rules even when particular results seem foolish.

A modest way of taking Schauer's suggestion is that it is for scholars. Whatever judges say, *we* understand that really a two-step process is involved: does the rule cover the situation? Should it be applied? For scholars to write continually that what judges do differs from what they say in opinions may be a bit awkward, but scholars often suggest that judges are not candid, or are confused. *If* Schauer's literalist approach had compelling theoretical reasons in its favor, scholars should adopt it, whatever judges do, but I have said enough to indicate my own view that the arguments against literalism are stronger than the ones in its favor.

What about Schauer's approach as a recommendation for practice? If adopted, judges would recognize, and reveal in opinions, that the meaning of a rule is determined by literal meaning. If the traditions I have mentioned remained in force, courts would regard themselves as constrained to follow rules in circumstances in which they now take evasive action. For the criminal law, amelioration of rigid rules (insofar as it is not provided by the general justification defense) would rest more exclusively than it presently does on police and prosecutorial discretion not to proceed[102] and on executive clemency after conviction. Rules that allow civil recovery often have no institu-

101 Applicability would depend on whether the defense reached city ordinances as well as provisions of the state criminal code.

102 Such discretion is already by far the most important means by which violations of the law that are not deemed serious are let go.

tion of amelioration, but an indirect consequence of unpalatable results might be more carefully drawn rules, and more rules with built-in principles of exception. If one were a strong believer in governance by mandatory rules, one might welcome this program as eliminating much judicial discretion. Although Schauer takes pains to present the values of rule-governance, his comments mainly respond to those who see no value in it whatsoever. *He* does not recommend that our legal system should become much more rule-governed.

The effect of his proposals on judicial practice might be less constraining. Judges might retain approximately the power to depart from literal meaning that they exert now, but they would be clearer and more candid that a two-stage process is involved, the second stage being a determination of whether to follow a rule. Judges would frankly recognize both that legislative supremacy does not entail that courts *always* follow legislative rules, and that faithfulness to higher courts does not entail that lower courts *always* follow their rules. This is the change in practice that Schauer seems to envision.

During a transitional period courts might hesitate to announce candidly that they were not following legislative and precendential rules,[103] but the long-term effects are much less certain. Perhaps embarrassment at announcing their own noncompliance would lead judges to apply rules more faithfully than they do now. In this event, courts that were more candid about noncompliance might follow literal rules more than at present. But consequences might be different. Once the principles that courts need not always follow rules of legislatures and higher courts are firmly established and endorsed in opinions, judges might depart from authoritative rules more freely than they do now. Now judges have to strain to explain why a rule should not be understood according to the apparent import of its words; if a privilege to depart from rules became embedded, the privilege generated by extreme cases of nonconvergence of formulations and justifications might extend to whatever consequences judges deemed unwise.[104] Respect for the *literal meaning* of rules might paradoxically yield a decrease in rule governance. For me, the likely practical consequences of Schauer's approach to meaning are too uncertain within the law to constitute a reason to adopt that approach. While I agree with Schauer that there *is* such a thing as literal meaning in many circumstances, I find no adequate theoretical or practical grounds for

103 By comparison, Guido Calabresi's proposal that courts disregard some statutes is much more limited. *See* Guido Calabresi, A Common Law for the Age of Statutes (1982).

104 Of course, some judges already incline in this direction.

concluding that that should be taken as determining the *utterance meaning* for legal rules. Our present practice puts more emphasis on ordinary understanding and purpose (based on legislative intentions or a reasonable perception of a complex of rules),[105] and I believe that emphasis is desirable.

VIII. CONCLUSION

Frederick Schauer has greatly illuminated the nature of mandatory rules and their cousins, rules of thumb. Contrary to what he has supposed, those who adhere to views about meaning different from his should be able to accept most of his claims about rules and about their practical value. Schauer offers a highly literalist approach to utterance meaning that does not fit dominant legal practice in the United States. For practitioners, "meaning" within the law must fit sensibly with the law's set of rules and practices, such as legislative supremacy. In my judgment, the theoretical arguments Schauer presents, and practical considerations one might adduce from his analysis, do not provide a sufficient basis for either practitioners or theorists to shift from a more purposive approach to meaning. "Meaning" in law should not be cabined by a highly literal approach to meaning, *and* should include assessment of factors that go beyond "ordinary meaning" in *any* linguistic sense.[106]

105 Different possible approaches to purpose are explored in Brink, *supra* note 55, at 126–29; and Moore, *Semantics of Judging*, *supra* note 55, at 262–63. Both give little (if any) weight to the views of legislators about specific practices.

106 *See generally* DWORKIN, *supra* note 59; Craig Hoffman, *When World Views Collide: Linguistic Theory Meets Legal Semantics in* United States v. X-Citement Video, Inc., 73 WASH. U. L.Q. 1215, 1219 (1995); Moore, *Natural Law Theory*, *supra* note 44; Moore, *Semantics of Judging*, *supra* note 55; *Proceedings*, *supra* note 2, at 850–51, 866–67, 875–76, 891–92; Francis J. Mootz, III, *Desperately Seeking Science*, 73 WASH. U. L.Q. 1009, 1017–18 (1995); Robert K. Rasmussen, *Why Linguistics?*, 73 WASH. U. L.Q. 1047, 1047–48 (1995); Stephen F. Ross, *The Limited Relevance of Plain Meaning*, 73 WASH. U. L.Q. 1057, 1057–58 (1995).